UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRIME HEALTHCARE SERVICES - ENCINO, LLC d/b/a/ ENCINO HOSPITAL MEDICAL CENTER,	
Respondent,	
SEIU LOCAL 121RN,	**Cases: 31-CA-066061** **31-CA-070323**
Union,	
and,	
SEIU UNITED HEALTHCARE WORKERS-WEST,	**Case: 31-CA-080554**
Union; and	
PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL & MEDICAL CENTER,	**Cases: 21-CA-080722**
Respondent,	
SEIU UNITED HEALTHCARE WORKERS-WEST,	
Union.	

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND'S DECISION

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondents Prime Healthcare Services - Encino, LLC d/b/a Encino Hospital Medical Center ("Encino") and Prime Healthcare Services - Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center ("Garden Grove"; together with Encino, the "Hospitals") respectfully submit this Brief in Support of Exceptions to the November 13, 2014 Decision of Administrative Law Judge ("ALJ") Jeffrey D. Wedekind.

The ALJ's decision is rife with error, ignoring the 800-pound gorilla that is SEIU United Healthcare Workers-West's ("UHW") attempt to use the bargaining process to destroy the Hospitals in pursuit of ulterior union objectives. One piece of evidence makes this abundantly clear: the summary of a "management" retreat of a competitor of the Hospitals in which UHW was a key participant. That summary states in relevant part that the parties would "[s]trengthen how we operate in partnership" by focusing on "real external threats[,]" including "competition." (RX-819 at 1.) An employer simply has no obligation to participate in its own demise by bargaining with a union that so explicitly views the employer not only as a "real threat," but a threat on the same terms as a competitor.

The ALJ's failure to grasp this simple concept led him to misapply the Act and controlling NLRB precedent. The NLRB has made it clear that an employer cannot be forced to bargain with a union that seeks to use its representative status to disadvantage an employer in order to seek competitive advantage elsewhere. In the instant case, the ALJ lost the forest for the trees, evaluating whether any of UHW's individual actions could be considered lawful, while ignoring the motive for engaging in those actions. Indeed, in every single NLRB case that ever

addressed this issue, the legality of the union's conduct which created the conflict of interest was irrelevant. For that reason alone, the ALJ's decision should be rejected.

The ALJ also erred by failing to apply the sanctions which were justifiably imposed on UHW and Counsel for the General Counsel ("General Counsel"). For over a year, UHW refused to comply with properly issued subpoenas. It repeatedly argued for revocation of the subpoenas in countless filings, including various petitions to revoke, a motion for reconsideration, a motion to strike the conflict of interest defense, and three special appeals, all of which were rejected. Having exhausted its appeals, UHW agreed to provide the requested information. Then, on the eve of trial, UHW refused to provide the information it had promised to produce. And during trial, after committing to make key witnesses available, it then refused to produce those witnesses. For this "contumacious" conduct, the ALJ sanctioned UHW – sanctions which precluded UHW from rebutting the Hospitals' case and which granted the Hospitals the benefit of any inferences. The ALJ's decision demonstrates that he not only ignored these sanctions, but actually granted inferences *in favor* of UHW, ascribing legitimate motives to UHW's conduct for which there is not a shred of evidence in the record.

Although these errors alone demand rejection of the ALJ's decision, they do not stand alone. The ALJ disregarded the evidence demonstrating that UHW has so completely subverted the bargaining process in pursuit of alternate objectives such that good faith bargaining has become impossible. Just a few of the countless examples include:

- The ALJ found that Prime has taken the position that UHW's corporate campaign was intended to pressure the Hospitals to accede to UHW's bargaining demands despite the fact that the only record evidence establishes that Prime has consistently taken the position that the campaign attacks were in furtherance of the Kaiser partnership;

- The ALJ speculated that the critical flaws in UHW's disparaging propaganda reports were unintentional despite the fact that the only record evidence indicates

that the reports were intentionally misleading propaganda pieces designed to harm Prime's business;

- The ALJ found that UHW's disqualifying conflict had nothing to do with the alleged ULPs at issue in this case even though the record conclusively establishes that the Hospitals elected not to produce the information requested by the unions due to concerns that the requests were made in bad faith in furtherance of the Kaiser partnership.

- The ALJ ignored UHW's express commitment to advance Kaiser's "institutional interests" even at the expense of UHW's own interests as bargaining representative. (RX-435 at E-25-26.)

As ALJ Wedekind's decision is replete with erroneous findings of law and fact, the Hospitals request that the Board refuse to adopt the ALJ's recommended remedy and dismiss the Complaint.

II. STATEMENT OF THE CASE

A. The ULP Charges

This case arises from four (4) unfair labor practice charges filed by UHW and SEIU Local 121RN ("121RN", and collectively with UHW, the "Charging Parties") that were eventually combined into a single consolidated complaint. The charges fall into two general categories: (1) during the course of bargaining for new collective bargaining agreements with the Charging Parties, the Hospitals failed to provide information requested by the Charging Parties; and (2) following the expiration of collective bargaining agreements with the Charging Parties, the Hospitals failed to continue making anniversary wage increases to employees represented by the Charging Parties pursuant to the expired agreements.

B. The Charging Parties' Subpoena Misconduct and UHW's Dishonest Refusal to Comply

On April 15, 2013, the Hospitals issued subpoenas duces tecum (the "Subpoenas") to UHW, 121RN, and the Service Employees International Union ("SEIU", and collectively with

UHW and 121RN, the "unions"). The Subpoenas sought information relevant to the Hospitals' defense that the unions' efforts to advance a competitor's interests to the detriment of the Hospitals, and their parent and affiliates, created a disqualifying conflict of interest.

The unions filed petitions to revoke the Subpoenas asserting various boilerplate objections, including that the requested documents were irrelevant and privileged. Although they asserted a host of arguments, one claim the unions never made was that their conduct was protected by the LMCA. On April 29, 2013, the ALJ issued an order allowing the conflict of interest defense to proceed and ordering the unions to comply with the Subpoenas, as narrowed by the Order.

For approximately the next year, the unions filed extensive motions, most of which simply rehashed the same, rejected arguments. These filings included three special appeals, a motion for reconsideration, and a motion to strike the conflict of interest defense. At one point, the ALJ recognized the abusive nature of the filings, labeling the unions' behavior as "contumacious." *See* October 29, 2013 Order Denying Motion For Reconsideration at 12.

On March 6, 2014, after all of these motions were denied, the unions agreed to provide documents responsive to the Subpoenas. The ALJ ordered that the parties engage in a mutual exchange of documents by June 3, 2014. However, shortly before the appointed dates, the unions reversed course and refused to comply.[1] The Hospitals provided responsive documents as ordered. Trial eventually resumed on June 10, 2014. UHW appeared at trial and stated that it would not comply with the document Subpoenas.

[1] The unions' prolonged noncompliance and related misconduct was summarized at length by the ALJ on the record during the hearing. (Tr. 45-52.) Accordingly, the Hospitals provide only a general overview of the unions' conduct in this brief.

As a sanction for UHW's refusal to comply with the Subpoenas, the ALJ issued an order precluding UHW and the General Counsel from presenting evidence or cross-examining the Hospitals' witnesses with respect to the Hospitals' conflict of interest defense. (Tr. 54-55.) The ALJ also granted adverse inferences against UHW and the General Counsel, stating that the scope of the inferences would be determined in his decision. (Tr. 76.)

C. UHW President Dave Regan's Refusal to Comply with the ALJ's Order

On April 15, 2013, the Hospitals issued a Subpoena to UHW President Dave Regan requiring his testimony at the hearing. Both prior to and during the hearing, counsel for UHW had indicated on more than one occasion that Mr. Regan would be present to testify on cross examination. (Tr. 37, 75-76, 273-74.) At approximately 10:00 p.m. the evening before Mr. Regan was set to appear, counsel for UHW represented that Mr. Regan was "out of the country" and would not be present to testify. The next morning, counsel for UHW gave a new excuse, stating that the reason Mr. Regan would not testify was because it saw no reason for him to do so in light of the position UHW took with respect to the document production. (Tr. 298-99.) Counsel for UHW at this time made the rather astounding claim that she was unaware of the intended non-compliance because she rarely, if ever, spoke with Mr. Regan, the President of her client and a person whose actions were at issue in the trial.[2] (Tr. 299.)

As a result of Mr. Regan's refusal to appear, the Hospitals were unable to question any UHW representative with knowledge of UHW's partnership with Kaiser or its hostile campaign against Prime, compounding the significant disadvantage caused by UHW's refusal to produce documents.

[2] Apparently, counsel for UHW would have the Hospitals believe that she intended to allow Mr. Regan to testify without ever having discussed with him the case or his testimony.

III. FACTUAL BACKGROUND

A. The Hospitals' Exchange of Information Requests with the Unions

1. The Hospitals Exchange of Information Requests with UHW

On January 12 and January 25, 2012, UHW, through its chief negotiator Richard Ruppert, served identical, facially irrelevant, requests for information upon Encino and Garden Grove purportedly designed to obtain information on the Hospitals' EPO plan in order to prepare a proposal on health benefits. (JX-12; JX-15.) Specifically, the requests sought two general categories of information: (1) the availability of doctors and specialists in the EPO plan; and (2) the costs of the plan to the Hospitals. (*Id.*)

Prime's Senior Labor and Employment Counsel, Mary Schottmiller, testified that it was uncommon for her to receive requests for information like the ones she received from UHW, particularly given the nature of the Hospitals' EPO plan. (Tr. 320.) The EPO plan is not an insurance plan. (Tr. 316). It is a fee-for-service plan through which employees obtain services from Prime hospitals or through doctors affiliated with Prime hospitals at a discounted rate. (Tr. 316.) Therefore, asking for information on the Hospitals' costs of providing services is essentially asking for the Hospitals' profit and loss information. (Tr. 557-58.) Ms. Schottmiller deemed this kind of information to be irrelevant to bargaining and confidential. (Tr. 558.)

Further, UHW's letters sought information that the Hospitals already had provided. The Hospitals had already made their benefits specialist, Tammy Valle, available to UHW during bargaining sessions to answer questions with respect to the health plans. (Tr. 580.) Additionally, the majority of the information requested in the letter could be found in the SPD for the EPO plan, which was provided to UHW on July 11, 2011, long before UHW served the information request. (RX-37; Tr. 212-13).

Despite the obvious lack of relevance of the requests, Encino did not simply refuse to produce the information. Instead, Ms. Schottmiller sent a letter to Mr. Ruppert on February 20, 2012 asking Mr. Ruppert to explain the relevancy of the information sought and requesting information from UHW. (JX-13.) Mr. Ruppert responded on March 20, 2012 but failed to provide a cogent explanation of relevance, merely making conclusory statements that healthcare is a "topic of bargaining." (JX-14 at 3.) As UHW has yet to provide an explanation as to why the information sought in the January 12 letter is relevant to bargaining, the Hospitals have not produced the information.

2. Encino's Exchange of Information Requests with 121RN

On April 5, 2011, 121RN, through Research Assistant Maryanne Salm, served a request for information upon Encino that was not only facially irrelevant to bargaining, but sought the type of sensitive, proprietary information that had previously been used by 121RN's affiliate, UHW, to perpetrate attacks on Prime's business. (JX-5.) 121RN's letter purported to seek information regarding the union's concerns over (1) employees' access to care (2) the quality of care provided at Prime Hospitals; and (3) the costs of the healthcare plan. (JX-5.) Upon close inspection, Ms. Schottmiller realized that the requests were not relevant at all to the parties' bargaining.

First, like UHW's information requests, the letter sought information regarding the costs of the plans, not to unit employees, but to Encino. (JX-5; Tr. 558.) Accordingly, 121RN was essentially seeking Encino's profit and loss data, which Ms. Schottmiller considered to be irrelevant to bargaining and confidential. (Tr. 557-58.)

Second, 121RN's requests seeking information pertaining to the quality of care at Prime hospitals were particularly curious. 121RN's members are the providers of such care and

therefore have first-hand knowledge of the level of quality at Prime hospitals. (JX-6 at 2.) It is difficult to fathom that 121RN would need to request information from Encino to assess the quality of care at Prime hospitals.

Not only was the information requested not relevant to bargaining, but it raised various red flags for Ms. Schottmiller with respect to the motives behind 121RN's requests. (Tr. 558.) 121RN's request for "MS-DRG" coding data, groupings of medical diagnoses that trigger Medicare reimbursement, (Tr. 731), was of particular concern to Ms. Schottmiller because such data had been relied upon by 121RN's affiliate UHW to produce disparaging reports on Prime Healthcare's patient care quality and business practices. (RX-91-92.) Moreover, shortly after the publication of the first report, UHW had made a nearly identical request for information regarding Prime's EPO plan from another Prime hospital seeking coding data, which referenced similar concerns over quality of care. (Tr. 340, 560.)

Despite the lack of relevancy and suspicious nature of the requests, Encino did not simply refuse to produce the information. (Tr. 558, 561.) Instead, Ms. Schottmiller provided the one relevant piece of information requested in Ms. Salm's letter, the physician list (Tr. 107), and sent a series of letters to Ms. Salm asking her to (1) explain the relevancy of her request and (2) requesting information from 121RN. (Tr. 559, 561; JX-6; JX-8; JX-10.) Although Ms. Salm responded to some of the letters, her explanations for the requests merely contained conclusory statements to the effect that healthcare is a relevant subject of bargaining. (JX-7; JX-9.) 121RN also refused to provide the information requested in Ms. Schottmiller's letters. (*Id.*)

B. The Dispute Over the Interpretation of the Anniversary Wage Increase Provisions of the CBAs

Subsequent to the expiration of the CBAs at Encino and Garden Grove, the parties have disputed whether the obligation to pay Anniversary Step Increases to bargaining unit employees survived the expiration of the contracts.

All three CBAs, which expired in March 2011, contain identical provisions with respect to the Hospitals' obligation to provide wage increases to bargaining unit employees. (JX-2 at 41-43; JX-3 at 49-51; JX-4 at 51-52.) Article XII Section 3 of the CBAs governs the Hospitals' obligation to provide "Annual Hospital Wide Increases." Pursuant to this provision, the Hospitals were required to grant an "Annual Hospital Wide Increase" on July 1, 2008, 2009 and 2010 in accordance with the wage scales located in the appendices attached to the CBAs. (*Id.*)

Article XII, Section 5 of the CBAs governs the Hospitals' obligation to pay "Anniversary Step Increases" to unit employees. (JX-2 at 42-43; JX-3 at 51; JX-4 at 52.) This section of the CBAs provides, "[i]n addition to the above hospital-wide annual increases, beginning July 1, 2008 … [e]mployees who are at or below the scale on the anniversary date of their most recent date of hire shall advance to the next step on the wage scale on that anniversary date…." (*Id.*) Both sets of increases are subject to a cap that limits the maximum amount of any increases that each individual employee can receive in any 12-month period to 9.25%. (JX-2 at 41; JX-3 at 50, JX-4 at 51.)

Subsequent to the expiration of the CBAs, the Hospitals ceased granting Annual Hospital Wide Increases without objection from UHW or 121RN, who agreed that this provision did not survive contract expiration. (Tr. 133-34, 188.) Due to an inadvertent error, however, a minority of 121RN and UHW members continued to receive Anniversary Step Increases subsequent to

contract expiration.[3] (Tr. 569.) The reason for this inadvertent error is that the contract had been negotiated by the Hospitals' predecessor, Tenet Healthcare, and therefore, the management team at the Hospitals was not familiar with how this provision of the CBAs was to be applied. (Tr. 573.) This inadvertent error was discovered in late 2011. (Tr. 757.) Shortly thereafter in November 2011, the Hospitals uniformly ceased granting Anniversary Step Increases for bargaining unit members. (Tr. 574.)

C. UHW's Strategic Business Partnership with Prime's Competitor Kaiser

1. History of the Partnership and Execution of the National Agreements

In June of 1997, the Coalition of Kaiser Permanente Unions ("Coalition") and Kaiser entered into what they termed a "strategic partnership" publicly known as the "Labor Management Partnership" ("LMP") explicitly designed to facilitate Kaiser's market dominance. (RX-93.) The Coalition consists of twenty-seven local unions who represent units of employees at various Kaiser facilities, including UHW and three other local unions affiliated with UHW's parent organization, the Service Employees International Union ("SEIU"). (RX-102) The governing body of the LMP is the Strategy Group, which is comprised of the high-level leadership from both the Coalition unions and Kaiser. (RX-435 at 11.)

From the inception of the partnership, the Coalition has been dominated by UHW and its parent SEIU. Indeed, the Executive Director and Chief Negotiator for the Coalition is none other than former SEIU President John August. (RX 435 at 72; RX 98 at 116.) And, UHW's President, Dave Regan and UHW's Kaiser Division Director, Joe Simoes, are members of the Strategy Group and are intimately involved in the development and implementation of the LMP's vision. (RX-438; RX-819 at 2.)

[3] Specifically, 17 of the 68 active 121RN members who reached an anniversary after contract expiration received an increase. (Tr. 755.) Similarly, 21 of the 82 active members of UHW who reached an anniversary received an increase after contract expiration. (Tr. 760.)

In furtherance of the LMP, the parties have negotiated and executed five successive "National Agreements" which govern the parties' rights and obligations. (RX-93; RX-95; RX-97; RX-98; RX-435.) The stated purpose of these agreements is to serve as the "blueprint for making Kaiser Permanente the Employer and care provider of choice." (RX-97 at 10; RX 98 at 3; RX 435 at 2.)

2. UHW's Contractual Commitment to Make Kaiser the Market Winner

a. UHW's Agreement to Ensure Kaiser Beats Competitors

The plain language of the National Agreements makes clear that UHW must work on behalf of Kaiser's business interests and use its influence to the fullest extent possible to ensure that Kaiser becomes the dominant provider in the healthcare market.[4] The most recent 2012 Agreement clarifies that "[t]he parties are dedicated to working together to make Kaiser the recognized *market leader* in providing quality health care and service." (RX-435 at 12.) (emphasis added). If there could be any doubt as to what that language means, the publicly available Leadership Action Plan created by UHW and Kaiser at a January 2010 retreat eliminates any ambiguity. The stated purpose of the retreat was for Kaiser and UHW to discuss mechanisms to "[s]trengthen how we operate in partnership" and "get more effective at it." (RX-819.) During the retreat, the parties agreed to "focus our respective constituencies on real external threats" including "competition…." (*Id.*)

[4] Although the National Agreements clearly establish UHW's commitment to advance Kaiser's position in the market at the expense of competitors, there are a number of partnership documents that UHW refused to provide that undoubtedly would shed additional light on the extent of that commitment. For example, the National Agreements require the parties to create a "Joint Labor Management Marketing Action Plan" ("Joint Marketing Plan") on an annual basis to the Strategy Group for approval and implementation. (RX-435 at 25). These Joint Marketing Plans were not produced in response to the Hospitals' Subpoenas.

b. UHW's Integration With and Control Over Kaiser's Business

The National Agreements are not limited to merely obligating UHW to assisting Kaiser to defeat its competitors. The National Agreements effectively create an integrated enterprise, where UHW operates in tandem with Kaiser as a full partner with actual decision-making authority.

The LMP created a new relationship pursuant to which "[p]artnership should become the way business is conducted at Kaiser Permanente." (RX 435 at 7.) The vision of the partnership is one in which "[u]nion leaders are fully integrated into the strategic decision-making process." (RX 96 at 7.) The core elements for implementation of this vision include that "[u]nions and management focus on joint problem-solving at all levels of the organization," and that "[t]here is shared leadership and decision-making at all organizational levels." (RX-96 at 7-8.)

The National Agreements make clear that this language is not mere window dressing. In fact, the National Agreements provide UHW with a level of decision-making authority that only a full business partner would enjoy. The 2010 and 2012 Agreements provide, "[i]ntegration of labor into the normal business structures of the organization … [means] *full participation* in the decision-making forums and processes at every level of the organization … and subject only to the capacity of the unions to fully engage and contribute." (RX-98 at 12; RX-435 at 7) (emphasis added). UHW's decision-making authority extends to a variety of areas traditionally reserved to management, including "budget, operations, strategic initiatives, quality processes and staffing." (RX-98 at 2; RX-435 at 2.)

The Leadership Action Plan provides further insight concerning how this integration of the Coalition unions into the business of Kaiser is accomplished. Pursuant to the Action Plan, union leaders at all levels are required to develop a comprehensive understanding of the

intricacies of Kaiser's business model in order to more effectively pursue the parties' shared interests in Kaiser's success. To that end, the Leadership Action Plan requires the unions to "[i]ncrease the business literacy of the frontline and the middle levels of the leadership in the unions" and "[t]each the business of KP to union stakeholders" so that they can "oversee its implementation." (RX-819 at 1-2.) The Leadership Action Plan also requires the unions to "Support the Middle" by "develop[ing] stronger organizational leadership among the middle levels in the unions, the medical groups, and management." (*Id.* at 1.)

c. UHW's Coordinated Activities in Furtherance of Kaiser's Interests

As a full partner in Kaiser's business, UHW is contractually committed to undertaking various activities on Kaiser's behalf to ensure that Kaiser's continued growth and success exceed that of its competitors. In fact, the most recent National Agreement makes clear that UHW is so committed to Kaiser's market dominance that it will pursue Kaiser's interests even at the expense of its own members. Pursuant to the 2012 Agreement, the Coalition unions and Kaiser are "committed as partners to the advancement of each other's institutional interests. This includes an understanding that no party will seek to advance its interests at the expense of the other party." (RX-435 at E-25-26.)

From the outset, UHW's commitment to marketing Kaiser as the "provider of choice" has served as a cornerstone of the partnership. (RX-93 at 1; RX-435 at 6.) Upon the signing of the initial 1997 Agreement, UHW committed itself to put forth its "best efforts" to "market Kaiser Permanente to new groups and individuals and to increase Kaiser Permanente's penetration in existing groups." (RX-93 at 2.) The subsequent National Agreements expressly reaffirm this obligation, calling for UHW to "market[] Kaiser Permanente as the … health care provider of choice[,]" (RX-435 at 6), make efforts to "expand Kaiser Permanente's membership in current

and new markets," (RX-97 at 25; RX-435 at 24), and "market Kaiser . . . to ensure the joint Labor Management Partnership marketing effort … result[s] in increased enrollment in Kaiser Foundation Health Plan." (RX-97 at 25; RX-435 at 24-25.) To do so, UHW agreed to "emphasize the unique advantages of the Kaiser Permanente model." (RX-98 at 11; RX-435 at 7.)

The focus of UHW's marketing efforts is facilitating Kaiser's growth. The parties have recognized that "it is absolutely critical for KP to grow its membership and adapt to a changing health care market." (RX-435 at 6.) To that end, "[t]he parties commit to the involvement of high-level Union, Permanente and Health Plan leaders to work together on growth strategies." (*Id*.) The National Agreements require UHW to "work in a proactive manner on growth potential, including discussing both contiguous and non-contiguous opportunities, new geographies and regions, mergers and acquisitions that best position opportunities for KP to grow more quickly and respond to opportunities." (RX 435 at 6.)

Although UHW refused to produce internal marketing documents, including the Joint Marketing Plans submitted annually to the Strategy Group, the publicly available Leadership Action Plan obtained by the Hospitals sheds light on the extent of UHW's efforts to advance Kaiser's institutional interests. (RX-819.) This Leadership Action Plan calls for a "SWAT Team on growth" that will "take responsibility for labor and management working together *like never before* on how to strategically and comprehensively grow our membership." (*Id.* at 2) (emphasis added).

To that end, the Leadership Action Plan contains a list of action items that require the Coalition unions to take proactive measures to ensure that "[o]ur model is recognized as the model for health care" and to "drive sustainable levels of high performance." (RX-819 at 1.)

These action items require the unions to "[e]xpand our collective efforts into a comprehensive growth strategy" in order to ensure "[s]ignificant membership growth and geographic expansion." (*Id.*) To do so, the Coalition unions agreed to work with Kaiser to anticipate and "prepare strategically for health care reform." (*Id.*)

d. Kaiser's Provision of Funds to UHW Pursuant to the Partnership

In exchange for UHW's agreement to assist Kaiser in achieving market dominance, Kaiser funnels payments to UHW through the medium of Taft-Hartley trust funds. In fact, the National Agreements call for Kaiser to fund two separate trusts, one for SEIU unions, and one for non-SEIU unions in the Coalition. (RX-98 at 40-41; RX-435 at 26.) The payments to the trusts are earmarked for "comprehensive training and education programs and services for the unions' respective membership." (RX-98 at 40; RX-435 at 26.)

D. UHW's Fraudulent and Baseless Attacks on Prime

During the same timeframe that UHW has committed to ensuring that Kaiser outperforms its competition, UHW has launched a coordinated and systematic campaign designed destroy Prime's business and limit its ability to compete in the healthcare market. Although UHW has gone to great lengths to conceal evidence of its hostility towards Kaiser's competitors in furtherance of the partnership, publicly available information obtained by the Hospitals conclusively demonstrates UHW's agreement to use its influence to attack and neutralize companies that pose a competitive threat.

Most tellingly, the Leadership Action Plan calls for the parties to "[s]trengthen how we operate in partnership" by focusing their efforts on "real external threats[,]" including "competition." (RX-819.) The record evidence demonstrates that UHW has done just that.

1. UHW's Baseless Allegations that Prime is a "Predatory Owner"

UHW began its attacks on Prime by publishing and disseminating articles and news releases characterizing Prime as a "predatory owner" with a "track record of profiting at the expense of patients, caregivers, and the community." (RX-201.) Without citing to any specifics, UHW alleged that Prime has a pattern of "tak[ing] over a hospital[,]" "suspend[ing] services … that patients need but aren't lucrative[,]" and canceling contracts with insurers resulting in an increase in patients' costs. (RX-201; RX-203; RX-213.) UHW also claimed that Prime has limited patients' access to care at its hospitals by "[c]utting experienced and trained hospital staff and services like mental healthcare and birthing." (RX-201.)

In order to further depict Prime as an irresponsible corporate citizen, UHW made unsupported allegations that "Prime illegally put thousands of emergency room patients in the middle of billing disputes with their insurers[,]" and that its executives had misappropriated "$2.8 million in questionable expenses." (RX-210 at 3.) Once again, UHW did not provide any actual facts or details in support of these claims. (*Id.*)

2. UHW's Feigned and Fraudulent Concerns with Septicemia and Malnutrition

UHW has also disparaged the quality of Prime's patient care and lobbed baseless allegations that Prime has engaged in illegal and fraudulent business practices. UHW began this line of attacks with the publication of a "study" attacking Prime and its hospitals entitled "Septicemia at Prime Hospitals" ("Septicemia at Prime"). (RX-91.) In this propaganda piece, UHW alleged that, based on its analysis of 2008 Medicare data, Prime hospitals experienced alarmingly high rates of the blood disease septicemia, a serious and often life threatening blood infection. (*Id*.) UHW claimed that there were only two possible reasons for Prime's reported

rates of septicemia: either pervasive patient care and infection control problems, or because Prime hospitals were engaged in systematic Medicare fraud by "upcoding" for cases of septicemia in order to receive a higher Medicare reimbursement. (RX-91 at 6.) With virtually no analysis, UHW discounted any other possible explanations for Prime's reported rates. (RX-91 at 6-7.)

UHW continued its attack on Prime's patient care in January 2011, when it published "Care and Coding at Prime Healthcare Services," ("Care and Coding") another "study" attacking Prime, this time based on UHW's analysis of 2009 Medicare data. (RX-92.) "Care and Coding" included the same false and unsupported allegations regarding Prime's rates of septicemia as the first propaganda report and also included similar allegations regarding malnutrition at Prime's hospitals (i.e., that Prime's hospitals had "improbably high" rates of malnutrition because of either extremely poor patient care or Medicare fraud). (RX-92 at 10.) Care and Coding did not even attempt to explore possible alternative explanations for Prime's reported rates of septicemia or malnutrition. (RX-92.)

3. The Fraudulent Nature of UHW's Attacks on Prime

Although UHW claims that its so-called "corporate accountability campaign" against Prime is motivated by a desire to build a "more just and humane society", (RX-92 at 2), the record evidence demonstrates otherwise. In fact, the evidence establishes that UHW's claims of social activism are mere pretext for its true motive: to damage Prime's business in order to further its partnership with Kaiser.

At the outset, it is simply not credible that UHW could identify an organization such as Prime as a poor corporate citizen that poses a threat to the community. The uncontradicted record evidence establishes that Prime provides highest quality of patient care and has been

recognized numerous times as a premier hospital system. Prime and its hospitals have received numerous accolades from Thompson Reuters and Truven Health Analytics, independent organizations that evaluate and rate healthcare organizations, for providing superior patient care during the same timeframe that UHW launched its disparaging attacks. (RX-83 at 2-3; RX-358 at 9; RX-359 at 5-6; Tr. 464, 466-69.)

For example, no less than five Prime hospitals in California were selected for placement on Thompson Reuters' prestigious "100 Top Hospitals" list for 2011 and 2012.[5] (RX-358 at 9; RX-359 at 5-6.) Thompson Reuters found that these hospitals achieved the "best organization-wide performance" and demonstrated "excellence in clinical care, patient perception of care, operational efficiency, and financial stability." (RX-359 at 2.)

Similarly, in February 2013, eight Prime hospitals were recognized as "100 Top Hospitals Award Winners" by Truven Health Analytics.[6] (RX-83.) These Prime hospitals were found to have "maintain[ed] a hospital-wide culture of excellence that cuts across everything, from patient care to housekeeping to administration." (*Id.* at 2.) Truven Health concluded that, "if all Medicare inpatients received the same level of care as those treated in the award-winning facilities … [m]ore than 164,000 additional lives could be saved[,] [n]early 82,000 additional patients could be complication free[,] $6 billion could be saved[,] [and] [t]he average patients stay would decrease by half a day." (*Id.*)

To say that Thompson Reuters' and Truven Health's evaluations of Prime Hospitals yielded different results from UHW's so-called "studies" is an understatement. (RX-358 at 1;

[5] Thompson Reuters recognized West Anaheim Medical Center as one of the top 100 hospitals in 2011 and Garden Grove, Centinela Hospital Medical Center, West Anaheim Medical Center, Chino Valley Medical Center, and Desert Valley Hospital in 2012. (RX-358 at 9; RX-359 at 5-6; Tr. 464; 466-67.)

[6] Truven Health recognized Centinela Hospital Medical Center, Chino Valley Medical Center, Garden Grove, Shasta Regional Medical Center, West Anaheim Medical Center, Desert Valley Hospital, and San Dimas Community Hospital as top 100 hospitals in 2013. (RX-83 at 2-3; Tr. 468-69.)

RX-359 at 2.) Indeed, seven of the twelve Prime hospitals targeted by UHW in its initial propaganda report as having quality of care and infection control problems received a "Top 100" designation for their patient care. (*Compare* RX-91 at 4 *with* RX-358, RX 359, and RX-83.)

Importantly, Thompson Reuters and Truven Analytics are neutral third-parties with no vested interest in the success or failure of Prime, Kaiser, or any other hospital system. In selecting the hospitals with the "best facility-wide performance[,]" Thompson Reuters employs a team of researchers, including epidemiologists, statisticians, physicians, and former hospital executives, to "review public data sources and develop an independent and objective assessment." (RX-358 at 1; RX-359 at 1.) The "methodology is objective" and is detailed at length in their reports. (RX-358 at 21-31; RX-359 at 23-24.) "Hospitals do not apply" for the awards and "winners do not pay to market this honor." (RX-358 at 2; RX-359 at 1.)

In contrast to Thompson Reuters and Truven Health's independent and objective evaluations, it is clear from the face of UHW's Septicemia at Prime and Care and Coding reports that these so-called "studies" are in fact result-oriented propaganda pieces designed not to provide an unbiased inquiry into Prime's diagnoses rates, but instead for the sole purpose of damaging Prime's business. The Hospitals presented the testimony of Dr. William Fairley, an expert in the field of statistical modeling and validity to provide an opinion on the legitimacy of UHW's reports. (RX-526.) Dr. Fairley testified that the methodology used in the reports is so flawed and unreliable that it cannot support UHW's allegations of systematic "upcoding" or quality of care problems. (Tr. 669-71.)

First, Dr. Fairley testified that the reports suffered from a "reporting bias" in that they failed to take into account the critical distinction between "reported and actual" rates of

septicemia and malnutrition. (Tr. 669-71.) This bias is particularly troublesome because it is well recognized in the medical community that septicemia and malnutrition are life threatening conditions that can be difficult to diagnose in patients and are therefore largely underreported. (Tr. 684-88, 713-15; RX-600 at 1; RX-616 at 12; RX-667 at 8; RX-641 at 6; RX 677 at 1; RX-338 at 5.) As a result, the data cited in the report is "so ill-suited" for a comparative analysis that it cannot be relied upon to draw any "useful conclusions." (Tr. 670-71.)

Second, Dr. Fairley testified that UHW's reports suffered from a "selectivity bias" in that they were based on a number of "arbitrary assumptions" that rendered the underlying data unreliable. (Tr. 671, 706.) For example, UHW arbitrarily excluded any hospitals with less than 10,000 qualifying stays and excluded certain classes of patients from its analysis. (Tr. 708.) UHW did not provide any explanation as to why it would be appropriate to use this particular set of selection criteria. (Tr. 708-712.) Nor did it conduct a "sensitivity analysis" to determine whether or not the same differential in reported rates would be present if UHW had used different selection criteria. (Tr. 711-12.) As a result of this haphazard approach, it is impossible to determine whether the conclusions listed in the report are accurate or merely "an artifact" of the assumptions made by UHW. (Tr. 712.)

Third, Dr. Fairley testified that the reports are inherently flawed in that they failed to properly consider alternative explanations for Prime's rates of septicemia and malnutrition. (Tr. 651, 670, 700-05.) For example, UHW's reports failed to consider that Prime hospitals' higher diagnosis rates could be the result of the aggressive diagnosis and treatment of these conditions, an approach advocated by leading medical associations, including the Center for Disease Control ("CDC"). (Tr. 699-704; RX-338.)

In fact, there is an ongoing "Surviving Sepsis" campaign in the medical community designed to raise awareness of septicemia and encourage the early detection and diagnosis of the condition – an approach that can drastically lower mortality rates for these diseases. (Tr. 685-6; RX-791.) As a result of the growing awareness of the seriousness of septicemia and the need for early diagnosis and treatment, the reported incidence of septicemia has been on the rise in recent years. (Tr. 680; RX-600 at 2; RX-667 at 4.) UHW's failure to provide proper consideration into whether Prime's elevated reported rates of septicemia and malnutrition could actually be a result of aggressive detection and diagnosis of these conditions renders the conclusions in the propaganda reports inherently unreliable. (Tr. 695, 699-704.)

Critically, the falsity of UHW's allegations is demonstrated by the fact that, during the same time frame as the attacks on Prime, it was reported that Kaiser had adopted the aggressive approach to diagnosis and treatment of septicemia recommended by the CDC, resulting in an increase in the diagnosis rate at certain Kaiser hospitals from 3.7% to as high as 13.5% percent. (RX-600 at 1-2.) Yet, there is no record evidence to suggest that UHW has analyzed Kaiser's reported rates of septicemia or commented on Kaiser's increased diagnosis rates. UHW's decision to target Prime for its reported rates of septicemia while ignoring similar reported rates by Kaiser makes clear that UHW's propaganda reports are baseless and were published solely to damage Prime.

4. UHW's Dissemination and Use of Reports to Inflict Damage Upon Prime

UHW's hostility towards Prime did not end with the publication of these false and disparaging propaganda reports. Instead, UHW widely disseminated the reports and relied on the baseless allegations therein to launch targeted attacks on Prime's business designed solely to

damage Prime's reputation, halt Prime's expansion, and force Prime to expend significant resources defending government investigations.

UHW began by forwarding the information contained in its propaganda pieces to, among others, the California Attorney General (RX-202), the California Department of Public Health ("CDPH") (RX- 209-210), and members of the U.S. House of Representatives (RX-204). UHW requested the immediate investigation of Prime hospitals to determine which of the "two possible explanations" identified in UHW's reports were responsible for Prime's diagnoses rates. (*Id.*) UHW's efforts resulted in investigations of Prime hospitals by the U.S. Department of Health and Human Services, the California Attorney General, the CDPH, and the Healthcare Facilities Accreditation program ("HFAP"). (RX-208; RX-810.)

Next, UHW inundated Prime's customers, prospective customers, physicians, hospital boards of directors, government officials, public interest organizations, and the public at large with highly disparaging letters, mailers, and flyers alleging that Prime's reported rates of certain conditions were a result of either systematic Medicare fraud, or "a shocking public health crisis." (RX 214-18). Citing to its own "studies," UHW claimed that Prime hospitals had the highest rates of septicemia and malnutrition in the country. (RX-213.) UHW, without citing to any actual data, also raised new allegations that Prime had "the highest rates in America of other major complications and comorbidities … including encephalopathy, acute heart failure, and aspiration pneumonia." (*Id.*) UHW encouraged the recipients to "blow the whistle" and join UHW in "exposing" Prime's alleged misconduct. (RX-213; RX-215.)

4. Other UHW Misconduct

In addition to the abusive tactics addressed above, UHW has engaged in other misconduct designed for no other purpose than to damage Prime's business and limit its ability

to compete, including efforts to block Prime from acquiring additional hospitals, advocating for "anti-Prime" legislation, and even recruiting other hospitals to join its attacks on Prime.

a. Blocking Acquisitions

At the same time that UHW committed itself to facilitating Kaiser's growth, it took a diametrically opposite approach with Prime. In October 2010, UHW called on state officials to implement a categorical ban on issuing new operating licenses to Prime. (RX-240.) Once again, UHW relied on the Septicemia and Care and Coding propaganda reports as well as its baseless allegations that Prime is an irresponsible corporate citizen to justify its stance. (RX-209-10; RX-240).

Subsequently, each time that Prime made an attempt to expand by acquiring a new hospital, UHW sought to block the acquisition. For example, following Prime's acquisition of Alvarado Hospital in November 2010, UHW reached out directly to CDPH falsely alleging that Prime was in violation of a California hospital licensing law and demanding that CDPH initiate immediate legal action to prohibit Prime from operating the hospital. (RX-210.) UHW also campaigned to block the bankruptcy sale of Victor Valley Community Hospital ("VVCH") to Prime, which ultimately led to the Attorney General's denial of the transaction. (RX-217, RX-502.)

UHW has also sought to diminish Prime's ability to compete with Kaiser by taking an active role in advancing anti-Prime legislation that would restrict Prime's ability to grow its business. For example, UHW worked together with California State Senator Ed Hernandez to champion California Senate Bill 408 ("SB 408"), a bill designed for no other purpose but to restrict Prime's ability to acquire additional hospitals. (RX-254; RX-502.) UHW made clear

that SB 408 was intended to target Prime, calling on the public to "writ[e] letters to the governor urging him to sign the bill to hold Prime accountable …." (RX-502; RX-216.)

b. Enlisting the California Hospital Association to Attack Prime

UHW's latest strategy to damage Prime is particularly egregious, as the record evidence makes clear that it intends to amplify its hostility towards Prime by recruiting other California hospitals to partake in the attacks. In the wake of UHW's execution of a "large[] scale strategic collaboration" agreement with the California Hospital Association ("CHA"), UHW's President Dave Regan conducted an internal conference call to discuss the details and logistics of the agreement. (RX-750aa.) During the call, Regan discussed UHW's plans to continue its attacks on Prime. Labeling Prime as a "bad actor" and an "outlier," Regan stated that UHW would coordinate with other major healthcare providers to develop a "specific strategy" to attack Prime, which entails:

> [S]it[ting] down with the leadership, not just the CHA, but all of the major providers, and say "Now what are we going to do about Cedars, Prime, and Providence? Because you've got two choices. We're going to continue to be public and to beat them up and to raise all of the stuff that drives you crazy, or you're going to figure out how to get these guys to heel. And … so I think we also now have to enlist our partners, right, who are now partners at a different level in saying there is just some behavior that, you know, you guys are now going to interfere with our ability to fix Med-Cal. And so Prem Reddy … how are we going to deal with you?... So I think we got to have a separate plan for those places. I think we should be intentional, and I think we should be direct with the leadership of the industry.

(RX-750aa at 22-23.)

Mr. Regan's statements could not be more clear: UHW intends to collaborate with other California hospitals to attack Prime and further damage its business.

IV. ARGUMENT

A. The ALJ Erred in Failing to Adhere to His Own Order on Sanctions

From the outset of this litigation, UHW engaged in a course of conduct designed not to resolve a *bona fide* dispute, but rather to delay the hearing, cause unnecessary burden and expense, and prevent the Hospitals from obtaining the necessary evidence to present their defense. The fact that UHW ultimately refused to produce responsive documents despite repeated adverse rulings from both the ALJ and the Board illustrates convincingly that UHW never had any intention of complying with the Subpoenas. In light of UHW's conduct, the ALJ recognized that "if there's any case" in which the imposition of trial sanctions would be appropriate "this would be the one[,]"[7] (Tr. 54) and he granted the full range of evidentiary sanctions, which precluded UHW from rebutting the Hospitals' case and granted the Hospitals the benefit of any appropriate adverse inferences. Stunningly, the ALJ reversed course in his Decision, as his unsupported findings of fact rendered these sanctions meaningless.

Throughout the Decision, the ALJ assumed facts in UHW's favor that had no basis in the record and even took judicial notice of facts not in evidence (*e.g.,* ALJD p. 7, lines 25-35, n. 17.) – facts that UHW was barred from introducing at the hearing. Making matters worse, not only did the ALJ decline to grant a *single* inference in favor of the Hospitals, but he granted a number of inferences in favor of UHW.

There are countless examples throughout the Decision. Among many others, the ALJ inferred that UHW's corporate accountability campaign was nothing more than a run-of-the-mill "public campaign[] to pressure an employer to accede to employee bargaining demands" (ALJD p. 24, lines 5-6); that UHW's corporate campaign was unrelated to its commitments to advance

[7] And that statement was made *before* UHW President Dave Regan failed to appear for testimony despite repeated assertions by counsel that he would be present, compounding UHW's already egregious behavior.

Kaiser's business; and that the critical flaws in UHW's disparaging propaganda reports were merely the result of inadvertent errors by the union representatives who prepared them. (ALJD p 25, lines 7-9). There were simply no facts on the record to support any of these conclusions. Due to the sanctions, the only record evidence on these issues were presented by the Hospitals, which conclusively establishes the contrary.

These errors were particularly critical because the Hospitals elected to move forward with the hearing rather than obtain a stay to seek subpoena enforcement since they had been assured that meaningful sanctions would be imposed. The ALJ's ultimate decision to disregard these sanctions permitted UHW to benefit from its misconduct, and compromised the integrity of these proceedings. If left unremedied, the ALJ's Decision will create an incentive for future litigants to abuse the process. These are the very dangers that the Board's sanctions are designed to prevent. *See McAllister Towing*, 341 N.L.R.B. at 402.

Because the unions were barred from introducing any evidence on the conflict of interest defense, there is, by definition, nothing in the record that could support the ALJ's findings. Given the absence of any contrary evidence, even without the sanction of adverse inferences, the Hospitals, as a matter of law, would have been entitled to the benefit of any "reasonable and rational inferences" that could be drawn from this undisputed evidence. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Batson*, 831 P.2d 924, 931 (Haw. 1992). When coupled with the sanctions, it is astounding that the ALJ failed to draw a single inference in favor of the Hospitals.

B. The ALJ Misinterpreted the Disqualifying Conflict of Interest

The only evidence introduced in this case conclusively demonstrates that UHW has an irreconcilable conflict of interest which makes good faith bargaining impossible. Although the Decision is rife with error, the critical flaw is the ALJ's failure to take into account the context

surrounding UHW's conduct. The ALJ evaluated each of UHW's individual activities in isolation and concluded that they did not create a conflict because they were the types of activities in which unions typically engage. (ALJD at p. 24, lines 4-11.) .

That finding is based on a fundamental misunderstanding of the Hospitals' argument. The Hospitals' argument is that UHW is so aligned with Kaiser, as demonstrated by its control of core management decisions outside of mandatory subjects, that it is a *de facto* competitor of Prime. The Hospitals also argued that UHW's attacks on Prime were employed in furtherance of Kaiser's commercial interests.

By focusing on the propriety of the UHW's actions, rather than the motive behind them, the ALJ stood the conflict of interest defense on its head, essentially ruling that even where a union acts in derogation of its bargaining obligation to advance an obvious conflict, that conduct is irrelevant so long as the union advances its improper ends through activity in which unions typically engage. That simply is not the law.

Where a union "has acquired a special interest which may well be at odds with what should be its sole concern – that of representing the interests of Respondents' employees," such a conflict "renders almost impossible the operation of the collective bargaining process." *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559 (1954). As explained by the NLRB in *Bausch & Lomb Optical Co.*:

> Collective bargaining is a two-sided proposition; it does not exist unless both parties enter the negotiations in a good-faith effort to reach a satisfactory agreement. What is envisioned by the Act is that … the parties will approach the bargaining table for the purpose of representing their respective interests…. The employer must be present to protect his business interests and the union must be there with the *single-minded purpose* of protecting and advancing the interests of the employees who have selected it as their bargaining agent …. These represent the basic ground rules from which good-faith bargaining stems.

Id. (italics emphasis added).

The conflict of interest is examined from the point of view of the employer. An employer is "entitled to know that in his dealings with [the union], the relationship will be governed by the legitimate concerns of collective bargaining and not special concerns unrelated thereto." *Harlem River Consumers Coop.*, 191 N.L.R.B. 314, 319 (1971). Where a union develops an ulterior interest, it imposes a "difficult burden [on the employer] of attempting to disentangle the Union's conflicting interests in order to determine, at all times during negotiations, the Union's motivation for each demand made." *Bausch & Lomb*, 108 N.L.R.B. at 1560. Such a dynamic "drastically change[s] the climate at the bargaining table from one where there would be reasoned discussion … upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the Union's motives would be engendered." *Id.* at 1561.

Although the seminal *Bausch & Lomb* decision involved a factual situation where the union had become a competitor of the employer, NLRB and federal court cases make clear that competition is not necessary for a disabling conflict to exist. The inquiry is a broad one, focused on whether the union has developed an interest inconsistent with its "sole concern" of representing the interests of bargaining unit employees. 108 N.L.R.B. at 1559.[8]

A fundamental underpinning of the NLRA is an obligation that both parties come to bargain terms and conditions of employment for the relevant bargaining unit. Many of the limitations on bargaining reflect the fundamental understanding that some topics are so central to

[8] The NLRB and the courts have found a disabling conflict in a variety of factual settings, including where: (1) the union's business agent had an "equity-like" interest in the business of a competitor, *Harlem Rivers Consumers Coop.*, 191 N.L.R.B. 314 (1971); (2) the union's business agent provided consulting services to the employer's competitor, *Pony Express Courier Corp.*, 297 N.L.R.B. 171 (1989); (3) the union's business agent was a creditor of the employer, *Garrison Nursing Home*, 293 N.L.R.B. 122 (1989); (4) the union's affiliate established a nurse placement registry that operated independently of the union and competed with the employer, *Visiting Nurses Ass'n, Inc.*, 254 N.L.R.B. 49 (1981); (5) a union agent made disparaging, unsubstantiated allegations that "reflect[ed] adversely upon the integrity of the business practices of the [employer]." *Sahara Datsun, Inc.*, 278 N.L.R.B. 1044, 1055 (1986).

management and the operation of the business that they simply are not subject to bargaining. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981). These topics involve core management functions such as "[d]ecisions concerning the volume and kind of advertising expenditures, product design, the manner of financing and sales …." *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964). The NLRA simply does not permit the NLRB to order an employer with respect to one of the most fundamental management functions – how it will position itself in the marketplace *vis-à-vis* its competitors.

C. UHW's Commitment to Advance Kaiser's Business Interests Makes It A De Facto Competitor of the Hospitals and Prime

The ALJ's decision simply fails to even address the Hospitals' argument that UHW's relationship with Kaiser makes it a *de facto* competitor of the Hospitals and Prime. This oversight is not a small one because, contrary to the ALJ's conclusions, the relationship is not a mere "partnership." It is far more than that, as demonstrated by binding agreements between Kaiser and UHW in which:

> The parties are committed as partners to the advancement of each other's institutional interests. This includes an understanding that no party will seek to advance its interests at the expense of the other party.

(RX-435 at E-25-26.) This written admission is conclusive – UHW has an obvious conflict, a complete and contractual obligation to advance the interests of the Hospitals' competitor. This obligation is so complete that UHW cannot even pursue its own interests (and necessarily those of its members) if that would disadvantage Kaiser.

This statement is only the exclamation point on a relationship so complete that there is no distinction between Kaiser and UHW when it comes to Kaiser's business interests. The extent of UHW's involvement in Kaiser's business is complete, with UHW's authority extending into

such matters as "budget, operations, strategic initiatives, quality processes, … staffing[,]" and even growth initiatives, including "mergers and acquisitions." (RX 435 at 2, 6.) The Agreements provide for:

- "[i]ntegration of labor into the normal business structures of the organization[.]" (RX-435 at 7.)
- "full participation in the decision-making forums and processes at every level of the organization … and subject only to the capacity of the unions to fully engage and contribute." (RX-435 at 7);
- "joint problem-solving" and "shared leadership and decision-making at all organizational levels." (RX-96 at 7-8); and
- assistance from UHW in determining which "geographies and regions" are ripe for "mergers and acquisitions that best position opportunities for [Kaiser] to grow more quickly[.]" (RX-435 at 6);

UHW has become a full business partner of Kaiser, so much so that it even determines how Kaiser will invest its capital.

The Leadership Action Plan drafted by UHW and Kaiser at the January 2010 Leadership Retreat further illustrates UHW's complete integration into Kaiser's business. (RX-819.) The mere fact that Dave Regan, President of UHW, participated in a "leadership" retreat with senior Kaiser executives says it all; UHW is part of the management structure, not merely a bargaining agent. The Action Plan exclusively addresses strategies to further Kaiser's interests, focusing on marketing Kaiser's "model for health care", facilitating Kaiser's "growth and expansion", and strengthening "performance metrics." (*Id.*) Consistent with UHW's contractual obligation to avoid advancing its interests at the expense of Kaiser, the document demonstrates that improving employees' terms and conditions are subordinated to the strategic goals of the business. The document specifically states that the parties should "[l]ink collective bargaining to strategic

objectives – and move through it as efficiently as possible so as not to dilute focus and take energy away from the *pursuit of our many interests.*" (*Id.*) (emphasis added).

UHW's obligation to advance Kaiser's business interests, coupled with its integration into all facets of Kaiser's business, unquestionably creates an unacceptable risk that UHW will abuse the bargaining process at the Hospitals. UHW's commitments to Kaiser raise precisely the concerns that it will "tailor[] employee demands in collective bargaining to ingratiate" itself with Kaiser. *Pony Express*, 297 N.L.R.B. at 172. UHW is in a position to make "exorbitant demands upon an employer for the purpose of driving the employer out of business so that a competitive company which it controls would be benefited."[9] *Id.*

Not surprisingly, UHW's commitment to assist Kaiser created the ULP's in this case. UHW's bargaining requests very much seemed as an attempt to request information regarding the Hospitals' business that is not available to the general public or the Hospitals' competitors. UHW's relationship with Kaiser creates an inherent danger that the information obtained from the Hospitals during bargaining "concerning trade operations or secrets may be relayed" to Kaiser, *Pony Express*, 297 N.L.R.B. at 172, or otherwise used by UHW to fulfill its commitment to develop "strategic initiatives" and improve "operations" at Kaiser. (RX-435 at 2.) The mere possibility that UHW could misappropriate sensitive or confidential information has created "a situation of mistrust inhibiting to the bargaining process." *Pony Express*, 297 N.L.R.B. at 172.

The undisputed record evidence makes clear that UHW has become the effective alter ego of Kaiser. UHW is in all meaningful requests the same as Kaiser, committed to advancing Kaiser's business interests above all else. UHW's functional integration into Kaiser creates an

[9] This danger is exacerbated by the fact that UHW enjoys various "economic weapons" that it can put to use in the event of a bargaining dispute, including the right to strike, through which UHW could "divert some, if not all, of the Respondent's business to [the competitor]." `108 N.L.R.B. at 1561.

unacceptable risk of abuse, and the ALJ's failure to consider UHW's status as a *de facto* competitor requires reversal.

D. The ALJ Failed To Consider The Totality of UHW's Conduct In Its Proper Context

In finding that no conflict of interest exists, the ALJ improperly parsed the record to segregate UHW's attacks on Prime from the purpose of those attacks - advancing Kaiser's competitive interests. The ALJ first found that UHW's partnership with Kaiser was a lawful partnership. The ALJ then found that UHW's attacks were legitimate labor activity. What the ALJ ignored completely was the crux of the Hospitals' argument: that UHW's attacks on Prime created an irreconcilable conflict of interest because they were in furtherance of the objectives of the Kaiser partnership.

The undisputed and contradicted evidence makes clear that UHW's dealings with the Hospitals were in pursuit of an objective that had nothing to do with the Hospitals' employees; rather, it had the objective of eliminating any competitive threats to Kaiser. Among other evidence, the Leadership Action Plan prepared by Kaiser and UHW during a January 2010 leadership retreat expressly commits UHW to work with Kaiser to focus on what the parties call "***real external threats.***" The very first such threat? "***Competition***." (RX-819 at 1) (emphasis added).

The Leadership Action Plan by itself creates the quintessential conflict of interest. It is difficult to imagine how the Hospitals can be expected to bargain with a union that considers it a threat to other employers with which the union has a relationship. The Board has recognized that when a conflict arises, an employer will find it impossible to "disentangle the Union's conflicting interests" to ascertain the union's true motives during bargaining. *Bausch & Lomb*, 108 N.L.R.B. at 1560. Here, the fact that UHW's leadership has met and collaborated with a

competitor's senior executives to develop plans for dealing with other employers such as the Hospitals unquestionably creates that exact problem. The ALJ erroneously ignored the import of the Leadership Action Plan, failing even to discuss why the Hospitals were obligated to place themselves at the mercy of a union that, in writing, had committed itself to their failure.

The Leadership Action Plan does not stand alone. UHW and Kaiser also created Joint Marketing Plans, which UHW was ordered, yet refused, to turn over. And on cue, the Leadership Action Plan was followed by the launch of UHW's attacks on Prime with the publication of the Septicemia at Prime Hospitals report. (RX-91.) Given that it would have taken some time to gather data and prepare that report, the timing of the attacks following the retreat strongly indicates that UHW was honoring its commitment to Kaiser to neutralize competitive threats. [10] Even absent the sanctions awarded by the ALJ, the record evidence creates a reasonable inference that UHW was working with Kaiser to damage the Hospitals' and Prime's business. *See Jackson v. Virginia*, 443 U.S. at 319.

If nothing else existed in the record, the affirmative obligation of UHW to essentially disable competitors for the benefit of Kaiser is sufficient on its own to "poison the collective bargaining process…." *David Buttrick Co.*, 361 N.L.R.B. at 307. Yet again, the record is replete with additional, uncontradicted, documentary evidence illustrating that UHW is contractually committed to disadvantaging the Hospitals and Prime in order to make Kaiser the "market leader" in healthcare. (RX-435 at 12.) One need look no further than the language of the

[10] To the extent there is any potential debate about the meaning or import of the Action Plan, the ALJ should have granted an adverse inference against the General Counsel and UHW. UHW President Dave Regan, who "developed and approved" the Action Plan could have testified as ordered by the ALJ and resolved any confusion. (RX-438; RX-819 at 2.) Mr. Regan's disregard of a valid subpoena and the ALJ's Order warrants an inference that any truthful testimony he offered on this issue would be damaging to the General Counsel's case. *See People's Transp.*, 276 N.L.R.B. 169, 223 (1985).

National Agreements themselves to understand the extent of UHW's disabling conflict. UHW's obligations in furtherance of this goal are extensive and include:

- "marketing Kaiser Permanente as the…care provider of choice[,]" (RX-435 at 6);
- making efforts to "expand Kaiser Permanente's membership in current and new markets[.]" (RX-435 at 24);
- "market[ing] Kaiser … to ensure the joint Labor Management Partnership marketing effort … result[s] in increased enrollment in Kaiser Foundation Health Plan." (RX-435 at 24-25); and
- "emphasiz[ing] the unique advantage of the Kaiser Permanente model." (RX-435 at 7.)
- committing itself to the "advancement" of Kaiser's "institutional interests." (RX-435 at E-25-26.)

No question exists that UHW committed to building Kaiser's business, which in a finite market must be at the expense of the competition. Even the ALJ recognized, "the cited provisions of the LMP and related action plans, as well as the substantial financial contributions by Kaiser and its employees to the joint labor-management partnership trust fund, indicate that the Coalition and Kaiser have partnered in a *serious and meaningful way* to make Kaiser the preeminent healthcare provider and employer *at the expense of competitors, including Prime*." (ALJD p. 23, lines 3-7) (emphasis added).

In dismissing this competitive problem as merely the results of a competitive marketplace, the ALJ erred on multiple counts. First off, no evidence in the record permitted such an inference; it is rank speculation contrary to the evidence. Second, it is contrary to NLRB law. The NLRB has recognized that the fact that there always will be an effect on competition is the reason that a conflict is so damaging to the bargaining relationship. As the NLRB explained in *Bausch and Lomb*, "the good business fortunes" of a company will necessarily have an "adverse effect … upon… its competitor and vice versa." 108 N.L.R.B. at 1560. The "success

of one could well mean the failure of the other." *Id.* In other words, UHW's advocacy for the Kaiser model can very well mean the demise of Prime. The ALJ's finding that UHW's conduct would have an effect on Prime and the Hospitals requires a finding that a conflict of interest exists.[11]

The ALJ compounded this error with his finding that the Hospitals failed to establish that UHW's activities compromised the bargaining relationship. That conclusion is erroneous as a matter of law; the Hospitals have no obligation to show that the bargaining obligation was compromised. An employer need not demonstrate that the union has *actually* engaged in misconduct to establish a disabling conflict. "Disqualification of a bargaining representative whose independence and loyalty are properly drawn into question should not await proof of actual misconduct." *R&M Kaufmann v. NLRB*, 471 F.2d 301, 304 (7th Cir. 1973). "[M]erely because the hazards which can be anticipated have not yet been realized," does not mean that the "Respondent-employer is nonetheless under a statutory duty to bargain …. It is enough for us that it could and that temptation is too great." 108 N.L.R.B. at 1562. "Such a danger, if proximate enough, without evidence of present abuse, can poison the collective bargaining process by subjecting every issue to the questioning of ulterior motives[.]" *David Buttrick Co.*, 361 N.L.R.B. at 307.

Not only did the ALJ fail to recognize that the possibility of abuse was sufficient to establish the defense, but he also failed to recognize that the abuse is measured based on whether UHW's actions would cause the Hospitals to have an "intensified distrust" of the union's

[11] The ALJ sought to dismiss this obvious conflict on the grounds that he was unaware of "any authority disqualifying a union because of a labor-management partnership agreement with a competitor." (ALJD at p. 24, lines 1-2.). In essence, the ALJ erroneously is stating that despite what principles of law the NLRB's conflict cases establish, those principles must be ignored unless the Hospitals can find a case "on all fours" with their situation. That in itself is an obvious error of law. The Board does not analyze the conflict of interest defense in such a formulaic fashion, as the principles underlying the defense are not limited to any particular factual situation. *St. John's Hospital & Health Ctr.*, 264 N.L.R.B. 990, 992 (1982).

motives. *Bausch & Lomb*, 108 N.L.R.B. at 1561. Here, it is not merely intensified distrust, it is actual knowledge that the union is actively working against the employer's competitive interests.

This interpretation is the only way to read the undisputed and unrebutted record evidence that UHW is working to make the Kaiser model the winner in the marketplace, and the statement that UHW considers competitors a threat to this model. And these statements, as well as hundreds of similar statements documented in the record, are no mere aspirations. UHW's agreements with Kaiser contractually obligate UHW to purse these goals contrary to the Hospitals' business interests. The universe of health care consumers is finite – a gain by Kaiser is a loss to others, including Prime and the Hospitals.

UHW's commitment to advance Kaiser's interests at the expense of the competition, while at the same time serving as a bargaining representative, provides UHW with both the opportunity and motive to abuse the process and engenders the type of distrust that the conflict of interest doctrine is designed to address. Having contractually bound itself to assist Kaiser, UHW cannot simply ignore opportunities to advance its commitments to Kaiser through its bargaining with the Hospitals.

E. The ALJ Misinterpreted the Extensive Evidence of UHW's Attacks on Prime

The evidence of UHW's disabling conflict did not end with the extensive contractual commitments to harm the Hospitals and Prime. The record demonstrates that the potential for abuse created by the partnership has been realized, as UHW has delivered on its commitment to Kaiser by launching relentless attacks on Prime and its business practices. The foundation for UHW's attacks are two reports which are critical of Prime hospitals' high reported rates of Septicemia. (RX-91; RX-92.) The reports purport to be careful, statistical analyses identifying systematic problems at Prime hospitals. An examination of the undisputed record evidence

reveals the contrary: that the reports are nothing more than result-oriented propaganda pieces based on inherently flawed methodology and designed for no other purpose but to damage Prime's business. With little analysis, however, the ALJ disregarded this evidence, reasoning that the Hospitals "never established that [the studies] were incorrect." (ALJD at p. 24, lines 26-27.) The ALJ's conclusion is erroneous for numerous reasons.

First, the statistical accuracy of the reports is irrelevant. Even if the statistics cited in the reports are 100% accurate, what the undisputed evidence demonstrates is that the reports focused on an area where Prime's practices were superior to the industry standard, and presented that superiority as a defect. Guidelines for the Centers for Disease Control and other leading medical authorities validate Prime's approach to Septicemia, recommending early and aggressive treatment even before a complete diagnosis had been made. (RX-338 at 5; RX-600 at 1-2; RX-667; RX-791 at 2.) Of course, such an aggressive approach will generate higher reported incidents.[12] (Tr. 681.)

Second, the ALJ completely misunderstood the Hospitals' position. The Hospitals never argued that the data used in the report was incorrect. Dr. Fairley testified that he had not even reviewed any of the underlying data or attempted to determine if the data was incorrect. (Tr. 666.) Rather, what Dr. Fairley explained at length was that UHW failed to follow even the most basic procedures necessary to conduct any kind of statistical analysis. (Tr. 669-72.) These errors were so basic that the approach could only be designed to produce a false result.

[12] That Prime's approach was the correct approach has been corroborated by the conclusions of truly independent and neutral third parties such as Thompson Reuters and Truven Health. These organizations have no stake, financial or otherwise, in the success or failure of any particular hospital. (RX-83 at 2-3; RX-358 at 2.) Prime's extensive awards for superior service from these impartial organizations demonstrates conclusively that UHW's attacks served only the purpose of undermining Prime's competitive advantage, entirely consistent with its contractual commitment to do so for the benefit of Kaiser.

Third, the ALJ's statement that union representatives need not be held "to the same standards as statisticians" (ALJD at p. 25, line 9) is nonsensical. The Hospitals never argued that they should be so held. While UHW may not be required to apply flawless methodology, the fact that it selected a target for its so-called "studies" with an impeccable reputation for providing quality care, and used a result oriented approach by deliberately applying an unsound methodology establishes that the reports were designed for no other purpose but to damage Prime as a competitor, as UHW had promised Kaiser it would do. There is no evidence whatsoever on the record to support a finding that the critical flaws in UHW's reports were inadvertent. By dismissing these flaws as mere mistakes, the ALJ not only defied his own ruling on sanctions by assuming facts that UHW was barred from introducing, but he essentially granted an inference in favor of UHW.

The same error underlies the ALJ's conclusion that UHW's attacks on Prime constitute legitimate bargaining tactics designed to "pressure [Prime] to exceed to employee bargaining demands." (ALJD p. 24, lines 5-6.) Once again, the only record evidence demonstrates the opposite – that the campaign had nothing to do with improving employees' terms and conditions. And if there could be any doubt as to the true intent behind the attacks, the fact that UHW refused to provide internal partnership documents or the underlying data used in the propaganda reports warrants the imposition of an adverse inference in favor of the Hospitals. *McAllister Towing & Transp. Co.*, 341 N.L.R.B. 394, 396 (2004), citing *Int'l Metal Co.*, 286 N.L.R.B. 1106, 1112 fn. 11 (1986). Not only did the ALJ fail to grant that inference, he granted an one in favor of UHW, as there is no evidence on the record to support a finding that UHW's corporate campaign was a legitimate bargaining tactic.[13]

[13] Although the ALJ noted that Prime has taken the position that UHW's corporate campaign was "intended to pressure the hospitals to accede to the Union's bargaining demands" (ALJD p. 24, lines 19-21), he neglected to cite

F. The ALJ Erred in Finding that the LMCA Absolves the Union's Conduct Under the NLRA

Despite acknowledging that the evidence unequivocally established UHW's agreement to advance Kaiser's interests at the expense of competitors like Prime, the ALJ found that this relationship did not create a disqualifying conflict because "labor management partnerships to enhance employer competitiveness are encouraged under the Labor Management Cooperation Act of 1978." (ALJD p. 23, lines 7-8.) Here, the ALJ missed the mark. The statute that establishes the employer's bargaining obligations is the NLRA. While the LMCA may inform labor policy, such a generalized statement of policy cannot create a bargaining obligation contrary to the NLRA, the statute which governs the scope of the employer's bargaining obligation.

The issue in this case is not whether UHW's conduct exceeds the boundaries of the LMCA; it is whether the Hospitals have a statutory obligation to bargain with a union that has agreed to partner with a competitor to damage their business. The LMCA is simply irrelevant, as it does not provide a license for a union to develop an interest which stands at odds with its obligations under the NLRA.

That the LMCA cannot salvage UHW's representative status under the NLRA is evident from the vast body of case law applying the conflict of interest defense. In those cases, the lawfulness of the underlying conduct that formed the conflict was not even challenged, and the existence of other legal remedies was deemed irrelevant. *See, e.g., David Buttrick*, 361 F.2d at 307, fn. 13. This is because the NLRA is concerned with protecting the integrity of the

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to any evidence to support that statement. In any event, Prime and the Hospitals have consistently alleged that UHW's attacks were not in furtherance of legitimate bargaining objectives, but of its partnership with Kaiser. Dating back to November 2011, Prime has asserted various claims against UHW in federal district court, all of which allege that UHW's corporate campaign against Prime was designed to provide Kaiser with a competitive advantage. Curiously, although the ALJ took judicial notice of these cases and relied upon them in his decision (ALJD p. 7, lines 25-35, fn. 17), he inexplicably failed to recognize that Prime's position with respect to the legitimacy of UHW's corporate campaign has remained consistent.

bargaining relationship; not policing a union's conduct away from the bargaining table. *Id.* By focusing exclusively on whether UHW's relationship with Kaiser was permissible under the LMCA, the ALJ ignored the critical piece of the analysis: the damage that the Kaiser partnership inflicts on the bargaining relationship with the Hospitals.

In any event, the Court of Appeals' review of *BellSouth Telecommunications, Inc.*, 335 N.L.R.B. 1066 (2001), the very case relied upon by the ALJ, makes clear that the LMCA cannot be interpreted to validate conduct that is illegitimate under the Act. In *BellSouth*, the Board addressed whether a collective bargaining agreement which forced objecting employees to wear a uniform displaying union insignia violated employees' rights to refrain from union activities. The Board found that the uniform requirement did not violate the NLRA because it was consistent with the underlying goals of the LMCA to enhance "organizational effectiveness and competitiveness." *Id.* at 1070.

The ALJ's reliance on the Board's decision is improper, as it was subsequently reversed by the Court of Appeals, who concluded that the uniform policy did violate employees' Section 7 rights. *See Lee v. NLRB*, 393 F.3d 491 (4th Cir. 2005). The Court noted that the fact that the employer had formed a "labor-management partnership" with the union did not create a "special circumstance" that excused or diminished the interference with employee rights under the Act. *Id.* at 496.[14] The implication of the court's decision could not be more clear: although the LMCA may seek to foster cooperation between management and labor, it does not do so to the derogation of rights and obligations under the NLRA.

[14] Notably, the court did not even bother to mention the LMCA in its decision, which suggests it did not believe it was even worth discussing whether statutory rights under the NLRA could be interpreted by reference to the policies of the LMCA.

Despite the irrelevancy of the LMCA, the ALJ proceeded to address it, observing that "[i]t may be that the Kaiser LMP stretches the purposes and policies of the [LMCA] too far" and that the partnership "is arguably inconsistent with the purpose and policies of the Act[.]" (ALJD p. 23, lines 25-31). However, he declined to even analyze this possibility, noting only that the Hospitals had not addressed the issue. This statement is baffling. The Hospitals' entire argument is that the LMP has gone too far. As argued at length in its post-hearing brief, the LMP is a labor-management partnership in name only. By ceding authority to UHW over core management decisions, UHW has become Kaiser's business partner and a *de facto* competitor of the Hospitals. *See* Hospitals' Post-Hearing Brief at pp. 43-46. It is this dynamic that the Hospitals argue has irreparably damaged the bargaining relationship. To say that the Hospitals failed to address this issue simply ignores the record.[15]

In any event, although the Hospitals bear the burden of persuasion with respect to the conflict of interest defense, there is no requirement that the Hospitals anticipate and preempt each and every potential argument raised by UHW or the General Counsel.[16] The ALJ's refusal to address this issue head-on is a stunning abdication of his judicial responsibilities and constitutes clear error.

H. The ALJ Abused His Discretion in Holding that the Hospitals Are Precluded from Raising the Conflict of Interest Defense

The ALJ, misreading *Greyhound Lines, Inc.*, 319 N.L.R.B. 554, 556-57 (1995), found that "[u]ntil such time as [the Hospitals] lawfully refuse to bargain and withdraw recognition

[15] The Hospitals addressed this very issue in response to one of the unions' special appeals, which was denied by the Board. *See* Hospitals' November 25, 2013 Opposition to Request for Special Permission to Appeal at p. 6. The Board apparently did not even find the point worthy of discussion in its decision.

[16] This is particularly true here, as the parties simultaneously submitted post-hearing briefs and did not have the opportunity to file reply briefs.

from UHW, they must comply with their bargaining obligations under the Act."[17] (ALJD p. 22, lines 16-17.) That finding is contrary to Board law and sound labor policy.

The Board has frequently reviewed the conflict of interest defense in the same context as here, a refusal to bargain charge. In fact, that was the exact situation in *Bausch & Lomb*, where the employer was charged with a refusal to bargain for suspending bargaining with the union. 108 N.L.R.B. at 1558-59; *see also, Western Great Lakes Pilots Ass'n*, 341 N.L.R.B. 272, 273 (2004); *Atlas Transit Mix Corp.*, 323 N.L.R.B. 1144, 1155 (1997); *Holmes Detective Bureau, Inc.*, 256 N.L.R.B. 824, 825 (1981); *The Adrian Daily Telegram*, 214 N.L.R.B. 1103, 1113 (1974). In all these cases, and many others, the Board reviewed the defense even though the employer had not withdrawn recognition.

The ALJ's reliance on *Greyhound* is misplaced. *Greyhound* did not hold or even suggest that withdrawal was a prerequisite to asserting a conflict defense. To the contrary, what *Greyhound* did was view a whole host of factors to determine if the alleged conflict of interest had a nexus to the alleged unfair labor practices. *Id.* at 556-57. The ALJ made this fact abundantly clear when he inquired as to whether there was any record evidence "that Respondent withdrew recognition for this reason *or explained its allegedly violative actions by reference to any conflict of interest on the part of the Union.*" *Id.* at 557 (emphasis added).

Any doubt that this was in fact the analysis in *Greyhound* is dispelled by the ALJ's further review of whether there was any evidence that:

> the Union effected a purchase of Respondent, that it controlled, or even influenced, Respondent or its bargaining positions because of any ownership interests. Even a cursory reading of this record would render strained, at the very least, the suggestion that the

[17] The error in the ALJ's circular reasoning is plain on its face. Under the ALJ's decision, the Hospitals cannot refuse to bargain when the union has a conflict unless they do so "lawfully." Yet the Hospitals cannot raise the conflict defense in a refusal to bargain proceeding in order to prove that refusal is lawful. This circular reasoning effectively reads the conflict defense out of the law.

> Union was in effect sitting on both sides of the bargaining table. Nor is there any basis for the assertion that the Union was a business competitor of Respondent

Id. Because *Greyhound* in fact reviewed the applicability of the defense on the facts presented, it clearly does not support any holding that withdrawal is required to assert the defense.

The ALJ further erred when he held that "Respondents failed to present any evidence that UHW's asserted disqualifying conflict of interest had anything whatsoever to do with Respondents' alleged unlawful actions" (ALJD p. 22, lines 1-3). Unlike *Greyhound,* which asserted the defense after the commission of the underlying unfair labor practices, the Hospitals raised their concerns long before the UHW even presented its information requests in January of 2012. In May 2011, the Hospitals expressed to UHW their concerns about the union's relationship with Kaiser in writing. (RX-22, RX-22A). The Hospitals expressly stated that they were concerned that the relationship had compromised the bargaining process. *Id.* Rather than simply refuse to bargain, the Hospitals sought information from UHW to allay their concerns, but UHW refused to provide the information. *Id.* Ms. Schottmiller also testified that the union's relationship with Kaiser was the *exact* concern that led her to question the legitimacy of UHW's requests. (Tr. 329, 517.) In short, not only were the alleged unlawful actions the direct result of the conflict of interest, the record is replete with documentary evidence establishing this fact beyond dispute.

Finally, the Hospitals' approach of reviewing the conflict of interest defense without requiring a withdrawal of recognition is consistent with national labor policy. The underlying purpose of the Act is to promote industrial stability; not to undermine it. *Independent Residences, Inc.*, 358 N.L.R.B. No. 42 at *23 (May 18, 2012), citing *NLRB v. Financial Institution Emp. (Seattle First Nat'l Bank)*, 475 U.S. 192, 208 (1986). As articulated by the United States Supreme Court, "stable bargaining relationships are best maintained by allowing

the … union to continue representing a bargaining unit" until such time as the Board has resolved challenges to the union's representative status. *Seattle First Nat'l*, 475 U.S. at 208.

In analogous contexts, such as when a union undergoes a structural change such as a merger or affiliation, employers are required to raise any challenges to a union's representative status in a manner that minimizes the disruption to the bargaining process. *Seattle First Nat'l*, 475 U.S. at 208-09; *Minn-Dak Farmers Cooperative*, 311 N.L.R.B. 942, 944-945. A union's development of a potential conflict of interest is no different. Any requirement that an employer withdraw recognition and disrupt the bargaining relationship during the pendency of proceedings that can last for several years stands in stark contrast to the underlying policies of the Act.

I. The ALJ Erred in Failing to Recognize that UHW's Extreme Hostility Towards Prime Makes Good Faith Bargaining Impossible

The ALJ also erred when he held that UHW's activities did not exceed the protections of the Act. Even assuming, contrary to all the evidence, that UHW was acting in pursuit of legitimate bargaining demands, disparaging Prime's business is not a protected pressure tactic. Such irrational hostility directed at an employer, without regard to truth or damage to the bargaining unit, is the type of conduct that makes good faith bargaining impossible. *Sahara Datsun*, 278 N.L.R.B. 1044, 1046 (1986).

In cavalierly absolving the union of its attempts to destroy Prime and the jobs of the employees it supposedly represents, the ALJ failed to recognize that the protections afforded to union pressure tactics are not absolute. In this respect, the United States' Supreme Court has clearly and convincingly rejected the very conclusion reached by the ALJ. "[S]harp, public, disparaging attack[s] upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income[,]" do not constitute legitimate bargaining activity. *NLRB v. Local Union No. 1229, Int'l Bhd. Of Elec.*

Workers (Jefferson Standard), 346 U.S. 464, 471-72 (1953); *Endicott Interconnect Technologies, Inc.*, 453 F.3d 532, 536-37 (D.C. Cir. 2006). This is true regardless of whether the union's disparagement is accurate or has been intentionally misrepresented. *Jefferson Standard*, 346 N.L.R.B. at 472.

Despite the extensive evidence of UHW's irrational hostility towards Prime, the ALJ erroneously found that the conduct was protected because UHW's reports "addressed matters plainly relevant to the unit employees' terms and conditions of employment." (ALJD p. 24, lines 13-14.) Here, the ALJ missed the mark. Although UHW's allegations of fraud and poor quality of care may be, at best, marginally related to employees' terms and conditions in the sense that it is the unit employees who are charged with providing the care at Prime hospitals, the only practical effect of UHW's attacks is to destroy any possibility of good faith bargaining with the Hospitals. The ALJ's failure to recognize the destructive impact of UHW's conduct constitutes clear error.

J. The ALJ Erred in Concluding that the Hospitals Were Obligated to Continue Anniversary Wage Increases After Contract Expiration

A careful review of the CBAs makes clear that the Anniversary Step Increase provisions were not intended to survive the expiration of the contracts. Instead, the only reasonable interpretation of Article XII Section 5 is that this provision expired along with the CBAs on March 31, 2011. The ALJ's failure to apply the plain language of the CBAs constitutes an abuse of discretion and justifies reversal.

First, the language of the Anniversary Step Increase provision makes clear that it is intended to operate in tandem with the Annual Hospital Wide Increase provision, which all parties agree expired along with the CBA. (Tr. 133-34, 188.) Article XII Section 5 makes no less than three references to the Annual Hospital Wide Increase provision, and the first sentence

of Section 5 provides that Step Increases will be granted "[i]n addition to the above hospital-wide increases." (JX-2 at 42; JX-3 at 51; JX-4 at 52.)

Furthermore, it is necessary to refer back to the Annual Hospital Wide Increase provision to apply Section 5. Indeed, the 9.25% cap referenced in the Annual Hospital Wide Increase provision applies to both types of increases. (JX-2 at 42-43; JX-3 at 49-50, JX-4 at 51-52.) In order to determine whether a bargaining unit employee is eligible for either type of increase, the parties would need to aggregate all increases during the prior twelve-month period, and determine whether an advance on the applicable wage scales would result in a total increase greater than 9.25%. (*Id.*; Tr. 752, 758-59.) There is simply no language in the CBAs to suggest that these two provisions should be interpreted differently for purposes of determining whether they survived contract expiration. The ALJ's failure to properly consider the significance of this language constitutes clear error.

Second, the ALJ failed to consider that it simply would not be possible for the Hospitals to administer Anniversary Wage Increases after contract expiration for certain employees. Indeed, although the General Counsel and the charging parties argued that the Hospitals could continue to use the 2010 wage scales in perpetuity after the CBAs expired, there is no way for the Hospitals to determine the amount of increase for unit members who have reached the last step of the 2010 scales.

Finally, the ALJ's reliance on the fact that the Hospitals, for a brief period, mistakenly continued to grant increases to some employees after the CBA expired, is improper. It is well established that an employer is entitled to unilaterally correct administrative errors resulting in overpayments to employees. *Eagle Transport*, 338 N.L.R.B. 489, 490 (2002); *Dierks Forests, Inc.*, 148 N.L.R.B. 923, 925-26 (1964). Although the ALJ found that *Eagle Transport* was

factually distinguishable in that it involved only a single overpayment, that distinction is of no moment. The undisputed evidence in this case demonstrates that the Hospitals did not have a uniform policy of granting wage increases after contract expiration. Indeed, only a minority of unit members who would otherwise have been eligible received an increase after contract expiration. (Tr. 755-756, 760.) Accordingly, these isolated instances of overpayment did not operate to preclude the discontinuation of the increases after the error was discovered under the standard set forth in *Eagle Transport*.

D. The ALJ Erred in Concluding that The Hospitals Unlawfully Failed to Respond to UHW's Information Requests

Even assuming that the Hospitals had any obligation to bargain with UHW in the first instance, the ALJ abused his discretion in concluding that the Hospitals unlawfully failed to provide information in response to UHW's requests.

First, the ALJ failed to properly take into account the fact that the majority of the information requested had already been produced in the form of the SPDs for the EPO plan, and through making benefits specialist Tammy Valle available during bargaining sessions. (RX-37, Tr. 212-13.) Although an employer has a duty to provide information to the union that is relevant to bargaining, there is no obligation to produce it in the precise form requested by the union. *See, e.g., Oil Chem. & Atomic Workers Local Union No. 6-418 v. Minn. Mining & Mfg. Co.*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 478 (5th Cir. 1963). As the Hospitals had already provided all relevant information that was requested, albeit in an alternate form, it had no further production obligations. *Minn. Mining*, 711 F.2d at 360. With respect to any remaining information contained in UHW's information request, the ALJ provided no explanation as to how that information could possibly be relevant to bargaining.

Additionally, the ALJ failed to take into account the fact that UHW's requests sought sensitive and confidential information. As discussed above, the Hospitals' EPO plan is not an insurance plan. It is a fee for service plan through which employees obtain services from Prime at a discounted rate. (Tr. 316.) Asking for information on the Hospitals' costs of providing care is akin to seeking profit and loss information. (Tr. 557-58.) Not only is this type of information irrelevant and unnecessary for preparing a counter proposal, but it is the type of proprietary information that the Hospitals are privileged to withhold. *See, e.g.*, *Am. Polystyrene*, 341 N.L.R.B. 508 (2004); *Hondo, Inc.*, 311 N.L.R.B. 424, 425-26 (1993).

Notably, although the ALJ cited to various cases in which an employer was required to provide information on its costs of providing health insurance, the employers in those cases did not assert, and the NLRB did not address, any argument that such information was confidential. Accordingly, the ALJ's reliance on those cases is misplaced.

E. The ALJ Erred in Concluding that Encino Unlawfully Failed to Respond to 121RN's Information Requests

The record evidence in this case clearly establishes that 121RN's information request was not made to facilitate good faith bargaining, but instead to abuse the process. 121RN's requests not only sought information that had "absolutely nothing to do" with the asserted purpose (Tr. 583), but they also sought the same type of coding information previously used by 121RN's affiliate to launch attacks on Prime's quality of care and coding practices, which occurred shortly after a similar request for information from UHW was made. (Tr. 340, 560; RX-3; RX-91-92.). As a result, Encino had firm ground to believe that the requests were being made for an entirely different and more nefarious purpose than what 121RN represented. Nonetheless, the ALJ summarily disregarded this evidence, noting only that a union is "presumed to act in good faith" and that "the mere fact that UHW had used similar MS-DRG data to issue critical reports about

Prime was insufficient to rebut that presumption …." (ALJD at p. 17, lines 12-14.) This haphazard analysis is woefully insufficient to support the ALJ's conclusions and smacks of abuse.

"The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it." *Hondo,* 311 N.L.R.B. at 425 (citing *White-Westinghouse Corp.*, 259 N.L.R.B. 220 n.1 (1980).) An employer has no duty to furnish information to a union that was requested for reasons other than legitimate arms-length bargaining. *Hondo, Inc.*, 311 N.L.R.B. 424, 425-26 (1993). In this case, in light of the suspicious nature of the requests, it was more than reasonable for Encino to request a proper explanation of relevance from 121RN. The ALJ's suggestion that Encino should simply have presumed that the information requests were legitimate because they pertained to healthcare ignores both the governing law and the practical realities of collective bargaining.

The ALJ also erred in concluding that 121RN's vague assertions of relevance should have been sufficient to assuage Encino's concerns. Where it appears that a union is seeking information from the employer for reasons other than good faith bargaining, "the Union must do more than provide general avowals of relevance in order to establish its need for the information. Rather, the Union must articulate how it would use the information to fulfill its duties as the collective bargaining representative of the Respondent's employees." *Hondo,* 311 N.L.R.B. at 426. In this case, rather than explain how 121RN intended to use the coding data, Ms. Salm's letters merely contained conclusory statements that such information was necessary to "better

understand the level of care at Prime facilities." (JX-7 at 3.) Such explanations fell far short of establishing the relevance of the coding data. *Hondo*, 311 N.L.R.B. at 26.

V. CONCLUSION

For the foregoing reasons, the ALJ abused his discretion in finding that the Hospitals did not meet their burden of establishing a conflict of interest and that the Hospitals violated the Act as alleged in the Complaint. Accordingly, the ALJ's decision should be reversed and the Complaint should be dismissed.

Respectfully Submitted,

___/s_____

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Dated: January 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2015, a copy of the Respondents' Brief in Support of Exceptions to Administrative Law Judge Wedekind's Decision was filed electronically and served upon the following:

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